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No. 93-2006

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BANCA NAZIONALE DEL LAVORO,
Petitioner,
v.
SMS HASENCLEVER GMBH,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia and the Court of Appeals of Georgia

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* THE U.S. COUNCIL ON INTERNATIONAL BANKING, INC. AND THE INSTITUTE OF INTERNATIONAL BANKING LAW AND PRACTICE, INC. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

NOW COMES The U.S. Council on International Banking, Inc. (the "USCIB") and the Institute of International Banking Law and Practice, Inc. ("the Institute"), and, with the consent of petitioner, Banca Nazionale del Lavoro ("BNL"), but without the consent of respondent, SMS Hasenclever GmbH ("SMS") (which has refused consent), respectfully request that this Court grant this motion and receive this amicus brief filed by the USCIB and the Institute, who together respectfully submit that the result in this case is contrary to federal law and to

the practices and expectations of banks in the United States engaged in international letter of credit transactions.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE* THE U.S. COUNCIL ON INTERNATIONAL BANKING, INC. AND THE INSTITUTE OF INTERNATIONAL BANKING LAW AND PRACTICE, INC. IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The U.S. Council on International Banking, Inc., established in 1924, is a non-profit trade association for banks located in the United States engaged in international banking operations. Its 371 members account for more than 95 per cent of the U.S. $200 billion outstanding in letters of credit and confirmations reported to federal regulators.[1] As indicated in the accompanying Table

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[1] Federally insured banks report outstanding letter of credit obligations quarterly to the Federal Financial Institutions Examination Council. As of December 31, 1993, the amount of outstanding letters of credit was $219,086,000,000.00. For a list of amounts outstanding by the top 300 banks, see *L/C Activity at 300 U.S. Banks: 1st Quarter 1993*, 9 Letter of Credit Update, 30 February 1994.

(Amic. App. 1a-11a), its members are located throughout the United States in every center of international banking. All of its members confirm letters of credit and are regularly affected by antiboycott provisions of the Export Administration Act (50 U.S.C. App. § 2401, *et seq.*) and the regulations promulgated thereunder (15 C.F.R. Part 769, as amended).

The Institute of International Banking Law and Practice, Inc. is a non-profit educational organization engaged in the harmonization and facilitation of letter of credit law and practice. Recently established in late 1992, it sponsors educational activities and has initiated a study directed toward the establishment of an arbitration center for letters of credit. Its membership consists of internationally recognized figures in the field of letter of credit law and practice.

INTRODUCTION

This case presents the question of whether federal antiboycott law provides a complying bank with an absolute federal defense to any conflicting letter of credit liability under state law. This issue is not particular to the bank involved in the instant case. The members of the USCIB have outstanding billions of dollars in letters of credit and are materially exposed on these credits should a state court be able to impose liability in a situation where the antiboycott statute prevents the confirming bank from forwarding documents. There is and has been a basic understanding by the banking community that compliance with the antiboycott statute as interpreted by the Office of Antiboycott Compliance ("OAC") constitutes an absolute defense to liability under the credit.

If allowed to stand, the state court decision in this case would seriously disrupt international banking operations. In effect, the decision empowers a foreign beneficiary of a letter of credit arbitrarily or deliberately to force upon a U.S. issuer or confirmer of a letter of credit the dilemma of either violating U.S. law by furnishing prohibited information in order to be reimbursed (risking civil and

criminal penalties) or to be liable under letter of credit law without a right to seek reimbursement. Under the rationale of this decision, all the applicant and beneficiary need do is agree between themselves that prohibited information not required by the letter of credit be inserted in a requisite document. No bank could conduct business under this state of affairs and such a result is neither sound nor justified. Moreover, it would have a seriously negative impact on the role of U.S. banks in international banking and the U.S. balance of trade and payments.[2]

STATEMENT OF THE CASE

The salient elements of this case are:

1. A bank located in the U.S. confirmed, in favor of beneficiary SMS Hasenclever GmbH, a letter of credit calling for various documents, none of which required any information which would violate the antiboycott laws.[3]

2. When the beneficiary later presented documents, the documents contained extraneous statements prohibited by the antiboycott laws.[4]

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[2] Issuance and confirmation of credits is generally undertaken for relatively modest fees, usually calculated in basis points predicated on the face amount of the undertaking. Typically, the fee would be 1/20 of 1 per cent (5 basis points) per quarter or any part thereof for a confirmation of a credit issued by a major international bank. On a million dollar letter of credit, valid for up to three months, the bank would assess only a small fee of approximately $500. As a result, banks are highly risk adverse with respect to letters of credit. Any significant increase in costs would make U.S. bank letters of credit non-competitive with those of other banks around the world.

[3] Brief for Petitioner at 6, *Banca Nazionale del Lavoro v. SMS Hasenclever GmbH*, 211 Ga. App. 360, 439 S.E.2d 502 (1993), *petition for cert. filed*, —— U.S.L.W. —— (U.S. June 16, 1994) (No. 93-2006).

[4] *Id.* at 8. The notion that a document presented to a bank in the U.S. which violates U.S. law can be conforming is erroneous under letter of credit law and practice. When a bank confirms a letter of credit, it undertakes to purchase documents stipulated in the credit, which in combination have an intrinsic value and all of which have significance. If the documents are missing information required by

3. In order to complete the letter of credit transaction, the confirming bank would have to forward the docu-

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the credit (*e.g.*, the name of the vessel on which the goods are laden in a bill of lading), the condition on which the confirmer's undertaking turns is not fulfilled. *See* B. Kozolchyk, *Strict Compliance and the Reasonable Document Checker*, 56 Brooklyn L. Rev. 45 (1990). Many of these expectations of the banking community are articulated in rules of an international character such as the Uniform Customs and Practice for Documentary Credits. The letter of credit in the instant case expressly incorporated the 1983 revision (I.C.C. Publication No. 400) of this internationally accepted standard of letter of credit practice. *See* UCP 400 Article 26(a)(ii) (requiring that, unless otherwise stipulated, a marine bill of lading indicate that "the goods have been loaded on board or shipped on a named vessel . . .").

If a required document contains extraneous data, it may also fail to conform, not fulfilling the condition on which the undertaking is premised. For example, if the packing list states that the goods originated in Country A (not information that would be required to appear on a packing list) but the certificate of origin indicates origin in Country B, the presentation would be rejected. UCP 400 Article 15 provides that "[d]ocuments which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in accordance with the terms and conditions of the credit."

If the documents are without any value whatsoever due to the fact that they have been forged or are fraudulent, the issuer or confirmer may refuse to honor them since it is implicit in its undertaking that the documents presented will have intrinsic worth. *See* U.C.C. Section 5-114(2), which indicates that an issuer or confirmer which proves forgery or letter of credit fraud may properly dishonor. For situations where courts have found implied letter of credit conditions by operation of law, *see Pastor v. National Republic Bank*, 390 N.E.2d 894 (Ill. 1979); J. Byrne, *Treatment of Successors to the Beneficiary in Non Transferable Credits: In Support of an Alternate Approach*, in 1994 Annual Survey of Letter of Credit Law and Practice 345 (James E. Byrne & Thomas P. Cavanaugh, eds. 1994). For an explanation of transfer in letter of credit practice, see V. Maulella, *A Banker's View: L/C Participants May Have Differing Interpretations of Transfer and Assignment*, in 1992 Letter of Credit Case Law Survey Handbook 278 (Rodney W. Turner & Thomas P. Cavanaugh, eds. 1993).

In a similar sense, it is an implied condition of every letter of credit undertaking subject to U.S. law that the documents pre-

ments to the issuer thereby furnishing prohibited information to a third person.

4. The Office of Antiboycott Compliance advised the parties to this transaction that such conduct by the confirming bank would constitute a violation of the antiboycott laws.[5]

5. The Office of Antiboycott Compliance regularly fines banks $10,000 for each instance in which such prohibited information is furnished by a U.S. bank.[6]

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sented will not violate U.S. law or that acting upon them will not require the bank to violate U.S. law (*e.g.*, purchasing documents related to illegal drugs). *See Chuidian v. Philippine National Bank*, 976 F.2d 561 (9th Cir. 1992) (bank cannot be required to pay on letter of credit where controlling law makes payment illegal). In addition, the doctrines of act of state, comity and public policy may be additional barriers to letter of credit liability. Where the beneficiary of the credit, by its spontaneous action subsequent to the confirmation, creates a condition which renders the documents presented without any intrinsic value to the confirming bank under U.S. law, the confirmer is not liable.

[5] For text of the reply of the OAC, see Brief for Petitioner at 13a, *Banca Nazionale del Lavoro v. SMS Hasenclever GmbH*, 211 Ga. App. 360, 439 S.E.2d 502 (1993), *petition for cert. filed*, —— U.S.L.W. —— (U.S. June 16, 1994) (No. 93-2006). In a letter from Mary Martin, Acting Director, Compliance Policy Division, Office of Antiboycott Compliance, Bureau of Export Administration, to John D. Griffin, dated 1/18/91, Ms. Martin explained that "[i]f the bank transmits the letter of credit without deleting the negative certificates of origin, it will be in violation of section 769.2(d) of the Export Administration Act, which is the prohibition against furnishing information about business relationships with boycotted countries or blacklisted persons."

[6] 15 C.F.R. § 787.1(b)(3), promulgated under the Export Administrative Act in connection with antiboycott regulation, provides: "*Civil penalty.* A civil penalty may be imposed for each violation of the Export Administration Act or any regulation, order or license issued under the Act either in addition to, or instead of, any other liability or penalty which may be imposed. The civil penalty may not exceed $10,000 for each violation except that the civil penalty for each violation involving national security controls imposed under section 5 of the Act may not exceed $100,000. The

6. The confirming bank dishonored and returned the presentation under the letter of credit because, as a result of the OAC opinion, it could not forward the documents in the form they had been presented without violating the antiboycott laws.[7]

7. The beneficiary did not re-present documents with the offending clause removed prior to expiry.[8]

8. The Georgia courts required the confirming bank to pay under state law notwithstanding the federal defense in these circumstances.

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payment of such penalty may be deferred or suspended, in whole or in part, for a period of time that may exceed one year. Deferral or suspension shall not operate as a bar in the collection of the penalty in the event that the conditions of the suspension or deferral are not fulfilled. When any person fails to pay a penalty imposed under this paragraph (b)(3), a civil action for the recovery of the penalty may be brought in the name of the United States, in which action the court shall determine *de novo* all issues necessary to establish liability. Once a penalty has been paid, no action for its refund may be maintained in any court." (Footnote omitted.)

[7] The credit required a "legalized and attested" invoice or certificate of origin. The confirming bank could not itself excise a clause from such a document. The document needed to have been reissued and legalized and attested again.

[8] It is noteworthy that the only party who could have avoided this dilemma is the foreign beneficiary who could have avoided the antiboycott laws by presenting the documents outside the United States in their original form directly to the issuer in Iraq.

REASONS FOR GRANTING THE WRIT

Given these factors, the Petitioner/confirming bank should be excused from liability under state law because the Export Administration Act provides a bank with an absolute defense from liability arising from compliance with its requirements.

Petitioner's brief recounts the legislative history of the Act and marshals arguments as to why the absolute defense under it should be available to banks for any prohibited action with respect to a letter of credit.[9] To these arguments, Amici add the following points:

I. UNDER THE ANTIBOYCOTT ENFORCEMENT SCHEME, BANKS ARE CHARGED WITH A PRIMARY ROLE WHICH NECESSITATES PROTECTION.

The U.S. government regularly uses the U.S. banking system as a means of implementing its foreign policy. In a wide range of areas from national security to drug money laundering, the banks are required to withhold payments, freeze funds, or report information.[10] Consistent

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[9] The Export Administration Act ("the EAA"), 50 U.S.C. App. § 2407(a)(1)(F) provides:

> (F) Paying, honoring, confirming, or otherwise implementing a letter of credit which contains any condition or requirement compliance with which is prohibited by regulations issued pursuant to this paragraph, and no United States person shall, as a result of the application of this paragraph, be obligated to pay or otherwise honor or implement such letter of credit.

[10] As another example of a federal statute that provides a defense to liability when there is compliance with federal law, see International Emergency Economic Powers Act, 50 U.S.C. § 1702(a)(3), which provides that a person acting in good faith under the provisions of the Act will be held harmless from any liability:

> (3) Compliance with any regulation, instruction, or direction issued under this title [50 U.S.C. § 1701, *et seq.*] shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect

with this approach, the antiboycott laws effectively force upon banks the role of front line enforcement. Since the bulk of affected international trade is channelled through the banking system, this is a particularly efficient method. For this reason, the OAC has actively interested itself in bank compliance programs, has carefully monitored bank performance, and has strictly levied fines against banks for technical violations. In effect, the statutory scheme makes banks the *de facto* agents of the federal government for purposes of monitoring the transactions which fall within their purview. As a result, every bank dealing extensively in international letters of credit has been forced to establish elaborate procedures, hire personnel, train them and audit the program to assure compliance. OAC also regularly audits banks for compliance with its regulations.

It is precisely because of this primary role that 50 U.S.C. App. § 2407(a)(1)(F) has accorded banks which have complied with the statute a "safe harbor". Absent such a provision, banks would face a threat of double liability under state and federal law.

The effect of the absolute defense in the antiboycott statute is to relieve banks which comply with the statute from the threat of liabilty under state letter of credit law. Otherwise, banks would be placed in the impossible position of having to choose between violating federal law or incurring liability under state law. Such a dilemma would make the regular conduct of this business impossible. It is this dilemma, produced by the state court decision, which is so worrisome.

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to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this title, or any regulation, instruction, or direction issued under this title.

II. IN APPLYING THE ANTIBOYCOTT LAWS, BANKS SHOULD BE ABLE TO RELY ON THE INTERPRETATIONS OF THE OFFICE OF ANTIBOYCOTT COMPLIANCE.

It is one thing to provide an absolute defense when a bank complies with the antiboycott laws. It is quite another matter—and perhaps more important—how and by whom compliance is measured. While banks are able to serve as "enforcers" of the antiboycott laws, it was never the intention of the statute or regulations and it is completely inconsistent with safe and sound banking practice for them to be "interpreters." The dynamic of the antiboycott compliance program is to encourage the neutral middleperson to implement it without necessitating an extensive and expensive federal infrastructure. In furtherance of this program, banks regularly request and receive specific interpretations from the OAC addressing actual situations.[11] Where the banks have fairly stated the issues and carry out these interpretations, they should be able to assert the absolute defense of 50 U.S.C. App. § 2407(a)(1)(F).

The rationale underlying the exemption is that banks should not be caught in the middle and forced to take the risk of guessing how the rules will ultimately be interpreted or construed. For the banking system to continue to function in this role, it is essential that there be a safe harbor upon which a bank can rely. Until the decision in the instant case, banks have assumed that they could rely on the opinions expressed by the OAC to shield them from double liability. Indeed, any other system is unworkable and would force banks to withdraw from this business.

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[11] In the instant case, Petitioner requested and received such an opinion, as did Respondent. Pet. App. 13a-14a; Respondent's Brief, p. 4.

CONCLUSION

To now permit the beneficiary to recover from the confirming bank when the beneficiary's conduct forced the confirming bank into an impossible dilemma is bizarre. The result of the state court decision would be to encourage beneficiaries and applicants to hide their intentions to later provide antiboycott declarations from the issuers and confirmers and to thereafter insert the prohibited statements in required documents. Faced with the possibility of such situations and the loss of a right of reimbursement, the U.S. international banking operations community would have no choice but to cease making such undertakings.

Because of the substantially adverse impact upon international banking operations, the Amici urge the Court to grant Petitioner a Writ of Certiorari.

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